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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION THREE

In re Alexis M. et al., Persons Coming Under the Juvenile Court Law.	B289637
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,  Plaintiff and Respondent,  v.  R.M. et al.,  Defendants and Appellants.	Los Angeles County Super. Ct. No. CK94107

APPEAL from orders of the Superior Court of Los Angeles County, Rashida A. Adams, Judge. Affirmed.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine Miles, Assistant County Counsel, and Kimberly Roura, Deputy County Counsel, for Plaintiff and Respondent.

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## INTRODUCTION

R.M. (father) is the father of Alexis M. (12 years old), Joseph M. (10 years old), and Michael M. (five years old). Before the Department of Children and Family Services (Department) intervened in September 2016, the children and their mother, G.S.,<sup>1</sup> were homeless and father had not been involved in the children's lives for at least a year, after having failed to reunify with Alexis and Joseph in a prior dependency proceeding. Although father was in federal custody for much of the children's dependency proceedings, the Department did not locate him until after the court established jurisdiction over the children, ordered them removed from their parents' custody, signed letters of legal guardianship for Alexis, and scheduled a selection and implementation hearing for Joseph and Michael.

Father appeals from the juvenile court's orders denying his petitions under Welfare and Institutions Code<sup>2</sup> section 388, which asked the court to vacate its jurisdiction findings and disposition orders as to all three children, as well as its order establishing a legal guardianship for Alexis. Father contends the Department violated his due process rights by not timely notifying him of the children's dependency proceedings. We affirm.

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<sup>1</sup> Mother is not a party to this appeal and did not participate in the underlying dependency proceedings.

<sup>2</sup> All undesignated statutory references are to the Welfare and Institutions Code.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **1. The Family's History and the Initiation of the Underlying Proceedings**

In October 2012, before Michael was born, the juvenile court sustained allegations against mother and father based on mother's abuse of methamphetamine, father leaving "a drug pipe" in the family's home within the children's reach, and father selling illicit drugs out of the home. The court terminated mother's and father's reunification services in October 2013.

After Michael was born in November 2013, he was removed from mother's custody after the Department filed a petition on his behalf, based on the same conduct supporting the allegations that the court sustained in October 2012. The court released Michael to mother's custody a few months later. In July 2014, the court sustained both allegations in Michael's petition and reinstated mother's, but not father's, reunification services as to Joseph and Alexis. In January 2015, the court terminated dependency jurisdiction over Michael, awarded mother sole legal and physical custody of the child, and granted father monitored visitation. Later that year, the court terminated jurisdiction over Alexis and Joseph.

In September 2016, the children were detained and placed in foster care after mother was arrested for attempting to steal from a market and the children were found left alone inside a car. All the children had lice in their hair, and Michael had a severe diaper rash. At the time, mother and the children were homeless, Joseph and Alexis weren't enrolled in school, and father's whereabouts were unknown.

On September 21, 2016, the Department filed a section 300 dependency petition on the children's behalf. As later sustained

by the court, the petition alleged: (1) mother failed to make “an appropriate plan for the children’s ongoing care and supervision” when she was arrested (b-1 allegation); (2) mother placed the children “in an endangering and detrimental situation by leaving the children alone and unsupervised in a vehicle in a public parking lot” (b-2 allegation); (3) mother has a history of substance abuse and is a current abuser of methamphetamine and marijuana (b-4 allegation); and (4) father has a history of abusing methamphetamine and a criminal history including convictions for possession of controlled substances for sale (b-5 allegation).<sup>3</sup>

Mother and father did not appear at the detention hearing. The court found the Department alleged a prima facie case under section 300, subdivisions (b) and (j), and ordered the children detained from their parents’ custody. The court ordered the Department to “present evidence of due diligence in attempting to locate [father].”

## **2. The Department’s Search for Father**

Shortly after mother was arrested, the Department interviewed the family about father’s whereabouts. Father hadn’t contacted the family for about a year. Alexis and Joseph last saw father “a long time” ago in Orange County, but they believed he had since been incarcerated. Mother heard that father was in custody in San Diego, but she wasn’t sure because she had “not been keeping up with his whereabouts” since they split up the previous year. The children’s maternal grandmother reported

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<sup>3</sup> The court later dismissed the b-3 and j-1 allegations, which both alleged mother failed to provide Michael necessary medical treatment for his severe diaper rash.

that father was “in San Diego,” and she believed he had been arrested for transporting illegal drugs about five months earlier.

The Department searched the Los Angeles County Sheriff’s Department’s database to try to locate father. Although not all of the records were accessible, the ones that were indicated father had been arrested five times between October 2014 and January 2016 but that he was no longer in the Sheriff’s Department’s custody. The Department also conducted a “Parent Locator” search, which yielded several “inactive” addresses for father but none that appeared to be current.

On November 2, 2016, the Department submitted a due diligence report for father. The Department had searched numerous databases, including the Department of Motor Vehicles, the “Probation Index,” and the armed forces’ records, using father’s name, social security number, and date of birth.<sup>4</sup> Most of the Department’s searches returned no valid addresses. While a search of the “California CHILD SUPPORT Automated System” (Child Support System) showed that father had been incarcerated at the San Diego Metropolitan Correction Center since at least April 5, 2016,<sup>5</sup> the Department reported the Federal Bureau of Prisons database showed there was “No Active Record” for father.

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<sup>4</sup> The first page of the due diligence report lists an incorrect year for father’s birthdate, but the individual search entries list father’s correct birthdate. The Department acknowledges this was a “clerical error,” and a social worker for the Department confirmed that she used father’s correct birthdate when conducting the searches.

<sup>5</sup> The Child Support System listed two “Start Date[s]” for father’s incarceration—February 19, 2016 and April 5, 2016—but it did not list any release date.

The Child Support System also listed two residential addresses for father, both on East 87th Place in Los Angeles. The Department visited the addresses, which were located on the same property. The occupant of one of the units told the Department that mother and father no longer lived there. The Department concluded that father's "whereabouts remain unknown."

### **3. Jurisdiction, Disposition, and Permanency Planning**

In January 2017, the court held a jurisdiction and disposition hearing, at which mother and father did not appear. The court found the Department had completed its due diligence in trying to locate mother and father.

After sustaining the petition's b-1, b-2, b-4, and b-5 allegations, the court declared the children dependents of the court and ordered them removed from mother's and father's custody. The court denied mother and father reunification services under section 361.5, subdivision (b), on the following grounds: (1) mother's and father's whereabouts were unknown (§ 361.5, subd. (b)(1)); (2) the juvenile court had previously terminated mother's and father's reunification services (§ 361.5, subd. (b)(10)); and (3) mother and father have a history of substance abuse and, in the three-year period before the Department filed the underlying petition, had resisted prior court-ordered treatment (§361.5, subd. (b)(13)).

The court set a selection and implementation hearing under section 366.26 for May 2017, and it ordered the Department to provide mother and father notice of that hearing by publication in the "Metropolitan News Co., Nuestra Comunidad and La Opinion." In May 2017, the court found father

to be the children's presumed father and continued the selection and implementation hearing to October 2017.

Prior to the selection and implementation hearing, the Department reported that Alexis was living with maternal relatives. Alexis was happy living with her caretakers, telling the Department, " 'I want to live here forever!' " Although Alexis was struggling with behavioral problems, her caretakers wanted to accept legal guardianship of her as long as the court continued jurisdiction over the child so the caretakers could have "an assigned social worker on the case." Joseph and Michael were living in a foster home while they waited to be placed with their paternal aunt, whose home had yet to be approved by "ASFA." At the time, the paternal aunt was only interested in serving as Joseph's and Michael's legal guardian, but she would consider adopting them in the future.

In October 2017, the court held a selection and implementation hearing for Alexis, at which mother and father did not appear. The court signed Letters of Guardianship, appointing the maternal relatives as Alexis's legal guardians. The court maintained jurisdiction over Alexis and awarded mother and father one monitored visit per month once they contacted the Department. The court continued the selection and implementation hearing for Joseph and Michael to April 2018.

#### **4. Father's Section 388 Petitions**

Father made his first appearance at a January 8, 2018 hearing after receiving notice of Joseph's and Michael's selection and implementation hearing.<sup>6</sup> Three days later, Michael was

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<sup>6</sup> Mother's whereabouts were still unknown.

placed with Alexis's legal guardians, who wanted to adopt Michael. The children's paternal aunt was interested in adopting Joseph, but she was afraid of father, who had threatened to kill her in the past if she adopted his children.

On February 16, 2018, father filed three petitions under section 388, one as to each child, asking the court to set aside its jurisdiction findings and disposition orders as to all three children, as well as its order appointing the maternal relatives as Alexis's legal guardians. As new evidence from the time those findings and orders were made, father claimed the Department failed to use reasonable efforts to notify him of the proceedings by not interviewing family or friends, looking for him on social media, or locating him in prison. Father asserted it would be in the children's best interests to vacate the prior orders and findings "[p]ursuant to *Ansley v. Superior Court* (1986) 185 Cal.App.3d [477 (*Ansley*)], [because] it is always in the best interest of the child to set aside 'a judgment that is proven void due to lack of due process notice.'" Father did not submit a declaration or any other evidence with his petitions. The court granted father an evidentiary hearing.

After father filed his section 388 petitions, the Department interviewed him and his probation officer. Father had been arrested for "Conspiracy to Transport Certain Aliens for Financial Gain" on February 18, 2016. Father was later convicted of that crime in the United States District Court for the Southern District of California and sentenced to 24 months in federal prison. According to his probation officer, father was in the custody of the "Bureau of Prisons" from mid-February 2016 until late-November 2017. At the time he appeared in this case, father was on "three years of supervised release" and living in an in-



patient drug-treatment program in San Diego. Father intended to get a job and obtain custody of the children once he completed the drug-treatment program.

The Department also interviewed the children about their current placements. When asked whether he preferred to be adopted by his paternal aunt or go back to living with father, Joseph replied, “ ‘I want to stay here, because if I go with my dad, I will go back to foster care.’ ” Joseph explained that “[father] didn’t take care of [them], he just went somewhere and didn’t come back.” Joseph told the social worker that he loves living with his aunt and that it “makes [him] happy to know [his] aunt will adopt [him] ... because she takes good care of [him.]” Alexis told the social worker that she “ ‘[kind of wants] to go back with [her] dad but it worries [her] ... [b]ecause of the past.’ ” Alexis clarified that she would prefer to live with her legal guardians but be allowed to visit father. She felt “good and happy” that her legal guardians were taking care of her: “They don’t scare [her].” Although Michael was too young to “comprehend the meaning of adoption,” he referred to his caretakers as “mom” and “ ‘dadda,’ ” and was “unable to make any comments about [father].” Michael told the social worker he likes living with his caretakers and feels safe with them.

As part of its response to father’s section 388 petitions, the Department submitted several documents generated during its November 2, 2016 due diligence search that were not attached to the original due diligence report. For example, the Department attached a printout from the Bureau of Prisons which showed that a person with father’s same name and age was incarcerated in “Atwater USP” as of November 2, 2016, with a mid-November 2017 release date.

On April 17, 2018, the court heard father's section 388 petitions. Father did not testify or submit any evidence to support his petitions at the hearing. The court denied the petitions, finding the Department made reasonable efforts to locate and notify father about the children's dependency proceedings. Even if "there were flaws in the original attempts to locate the father's whereabouts," the court explained, it would not be in the children's best interests to grant father's petitions and vacate the court's prior orders and findings. The court also found "there's no evidence" that the prior orders and findings father sought to vacate would have been any different had father attended the jurisdiction, disposition, or selection and implementation hearings, since father had failed to reunify with Joseph and Alexis in their prior dependency case and he would have been in custody through nearly all of the maximum statutory period for reunification services in this case. After denying father's petitions, the court scheduled a selection and implementation hearing for Joseph and Michael for August 14, 2018.

Father timely appealed from the court's April 17, 2018 orders denying his section 388 petitions.

## **DISCUSSION**

Father contends the juvenile court erred in denying his section 388 petitions because the Department failed to use reasonable and diligent efforts to notify him of the children's dependency proceedings in a timely manner. Father insists we must reverse the court's orders denying his petitions and vacate the jurisdiction findings, disposition orders, and the order establishing a legal guardianship for Alexis because they are void for "lack of notice." We disagree.

A parent has a due process right to notice that “is reasonably calculated to apprise him or her of the dependency proceedings and afford him or her an opportunity to object.” (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188 (*Justice P.*)) Due process is satisfied where a parent cannot be located but the Department has made a good-faith, thorough, and “ ‘systematic investigation and inquiry’ ” to try to find the parent. (*In re Claudia S.* (2005) 131 Cal.App.4th 236, 247.) Thus, the failure to give actual notice to a parent does not invalidate the dependency proceedings if the Department has made a reasonable, but unsuccessful, effort to find the parent. (*Ibid.*)

Under section 388, a parent may raise a due process challenge based on the lack of notice. (*Justice P.*, *supra*, 123 Cal.App.4th at p. 189.) A section 388 petition is addressed to the juvenile court’s discretion, and we will not disturb an order denying the petition unless the court has clearly abused its discretion. (*In re Marcos G.* (2010) 182 Cal.App.4th 369, 382.)

The petitioning parent “has the burden of showing by a preponderance of the evidence (1) that there is new evidence or a change of circumstances *and* (2) that the proposed modification would be in the best interests of the child. [Citations.] That is, ‘[i]t is not enough for [the petitioner] to show *just* a genuine change of circumstances under the statute. The [petitioner] must show that the undoing of the prior order would be in the best interests of the child. [Citation.]’ [Citation.]” (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 615 (*Mickel O.*)) “In assessing the best interests of the child, ‘a primary consideration ... is the goal of assuring stability and continuity.’ [Citation.]” (*Id.* at p. 616.)

As a preliminary matter, we conclude substantial evidence supports the court’s finding that the Department was reasonably

diligent in trying to locate and notify father of the children's dependency proceedings. When the Department detained the children in September 2016, none of the family members knew where father was. Alexis had last seen father "a long time" ago in Orange County, and she and Joseph believed father had since been incarcerated. Mother had heard father was incarcerated in San Diego, but she wasn't sure because she hadn't heard from him in about a year. The maternal grandmother believed father was in San Diego and had been arrested about five months before September 2016. Nothing in the record shows father tried to contact any family members or locate his children before or after the dependency proceedings were initiated.

Although the Department's due diligence search returned three potential places where father could be located, nothing in the record confirms the Department would have found him at any of those locations before the jurisdiction and disposition hearing or Alexis's selection and implementation hearing. With respect to the two addresses located on East 87th Place in Los Angeles the Department found during its due diligence search, the Department visited both locations. The tenant of one of the addresses told the Department mother and father did not live there, and the other address was vacant. As for the two detention centers whose databases showed a person matching father's description may have been incarcerated in each location as of November 2, 2016—San Diego Metropolitan Center and Atwater USP—father presented no evidence showing he was incarcerated in either place at any point before Alexis's selection and implementation hearing. (See *In re Emily R.* (2000) 80 Cal.App.4th 1344, 1353 [the petitioning parent has the burden of showing the social services agency's search efforts would have

been successful in locating him].) Thus, it is unclear whether the Department would have located father at either detention center.

Because the Department's efforts to locate father were reasonable, and because father did not rely on any other new evidence or change of circumstances to support his petitions, he failed to satisfy the first prong of section 388. For that reason, the court properly denied his section 388 petitions. (See *Mickel O.*, *supra*, 197 Cal.App.4th at p. 615.) Nevertheless, even if we were to conclude the Department was not reasonably diligent in attempting to locate and notify father, he would still have to show the children's best interests would be promoted by vacating the court's jurisdiction findings, disposition orders, and the order establishing a legal guardianship for Alexis. (*Justice P.*, *supra*, 123 Cal.App.4th at pp. 189–190.) Father failed to do that here.

In support of his petitions, father failed to allege any facts, introduce any evidence, or make any arguments showing why, based on the facts of this case, it would have been in Joseph's, Alexis's, and Michael's best interests to vacate any of the court's jurisdiction findings, disposition orders, or the order establishing a legal guardianship for Alexis. Instead, father only asserted that it is always in a child's best interest to "set aside a 'judgment that is proven void due to lack of due process notice.'" This tactic is fatal to father's appeal.

As the court in *Justice P.* explained, it is not necessarily in a child's best interest to grant a section 388 petition whenever a parent has established a notice violation. (See *Justice P.*, *supra*, 123 Cal.App.4th at pp. 190–193.) The current dependency statutory framework makes clear that a "child's interest in having a stable and permanent home is paramount" once reunification services have been terminated. (*Id.* at p. 191.) The

current statutory framework also “imposes strict deadlines to resolve [a] child’s future in a timely fashion; for example, at the 18-month deadline, parent and child are either reunified, or a permanent plan, such as adoption or guardianship, is implemented.” (*Ibid.*) It is therefore antithetical to the purpose of the dependency statutory scheme, as well as section 388 specifically, to adopt an automatic rule, like the one father proposes, that does not require a case-by-case assessment of whether it would be in the child’s best interests to grant a parent’s section 388 petition.<sup>7</sup> (See *Justice P.*, at pp. 190–193.) Because father made no attempt to show how the children’s best interests would be served by vacating the court’s jurisdiction findings, disposition orders, and the order establishing a legal guardianship for Alexis, the court did not err when it denied father’s section 388 petitions. (See *Mickel O.*, *supra*, 197 Cal.App.4th at p. 615 [the petitioning parent has the burden of showing it would be in the children’s best interests to grant a section 388 petition].)

In any event, the facts of this case show it would not be in the children’s best interests to grant father’s petitions. Before the Department intervened in September 2016, the children’s home environment was unstable to say the least. Father was absent,

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<sup>7</sup> Father relies on *Ansley*, a case that was decided more than 30 years ago, to argue an automatic rule should apply. (See *Ansley*, *supra*, 185 Cal.App.3d at p. 490.) As the court in *Justice P.* explained, the statutory scheme in effect at the time *Ansley* was decided did not place the same emphasis on expediency in achieving permanency and stability for a dependent child, which is a paramount goal under the current scheme. (See *Justice P.*, *supra*, 123 Cal.App.4th at pp. 191–192.) For the same reasons outlined in *Justice P.*, we decline to follow *Ansley*.

the children and mother were homeless, and mother had to resort to theft to provide food for the children. All of the children had lice in their hair and Michael had a severe diaper rash when they were detained by the Department. Joseph and Alexis weren't attending school on a regular basis, and Alexis reported that she did not feel safe with the family's living situation because she was afraid " 'someone is going to break in' " to the family's car.

Since the Department intervened, however, all three children have been placed in nurturing homes where their emotional, medical, and educational needs are being met. And their caretakers have offered them permanent homes with the possibility of adoption. Father, on the other hand, has failed to show he would be able to provide the children a stable and nurturing home environment if this case were sent back to square one. Father failed to reunify with Joseph and Alexis in their prior dependency case because he resisted drug treatment, and, as noted above, he made no effort to support the children while they were homeless. Although father intends to obtain a job after completing his drug-treatment program, he offered no evidence showing he currently is able to support the children and provide them a stable home.

## **DISPOSITION**

The court's April 17, 2018 orders denying father's section 388 petitions are affirmed.

## **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.